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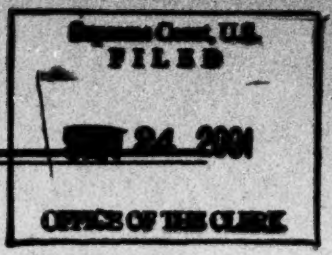

IN THE

Supreme Court of the United States

JANET RENO,

Petitioner,

v.

FREDERICK A. LAKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether respondent is entitled to United States citizenship because 8 U.S.C. § 1409(a) violates the equal protection guarantee of the Fifth Amendment to the Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT	2
DISCUSSION	4
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
CASES:	
Breyer v. *Meissner*, 214 F.3d 416 (3d Cir. 2000)	6
Elias v. *United States Dep't of State*, 721 F. Supp. 243 (N.D. Cal. 1989)	6-7
Hodel v. *Irving*, 481 U.S. 704 (1987)	6
Miller v. *Albright*, 523 U.S. 420 (1998)	6
Powers v. *Ohio*, 499 U.S. 400 (1991)	5
United States v. *Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999)	6
Wauchope v. *United States Dep't of State*, 985 F.2d 1407 (9th Cir. 1993)	6-7
STATUTES:	
8 U.S.C. § 1182(h)	4
8 U.S.C. § 1409(a)	*passim*
8 U.S.C. § 1421	7
8 U.S.C. § 1427	7

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BRIEF IN OPPOSITION

Respondent Frederick A. Lake agrees with petitioner (the "Government") that consideration of this petition should be deferred pending resolution of *Nguyen* v. *INS*, No. 99-2071, which presents the same issue. However, respondent does not agree with the Government's alternative suggestion that the Court should grant certiorari and summarily reverse on the question of standing in the event the disposition of this petition is not controlled by *Nguyen*. Accordingly, the Court should hold this petition pending a decision in *Nguyen*. But if the Court concludes, at that time, that this petition may not be controlled by the decision in *Nguyen*, respondent requests that the Court allow him a further opportunity to respond to the Government's alternative suggestion and to address the significance of the *Nguyen* decision.

COUNTERSTATEMENT

Mr. Lake was born in Jamaica on March 31, 1953 to Edith Mahabeer White, then a Jamaican citizen, and Joseph A. Lake, Sr., a United States citizen. Pet. App. 2a. Although Mr. Lake's parents never married, there was never any question that Joseph Lake was his father, and Mr. Lake had substantial, frequent, and meaningful contact with his father over the years. *See* Ct. App. J.A. 117, 120-121, 127-132, 153-154, 162-166, 169. During Mr. Lake's childhood and adolescence, his father went to Jamaica frequently and always brought his son gifts, such as toys, clothing, and money. *Id.* at 120-121, 127-128, 162-165. His father also wrote him often, sending him cards and letters, and on special occasions such as birthdays and holidays, barrels and boxes containing clothing, sneakers, and food items. *Id.* at 128, 165-166. The relationship between father and son was close and loving. *Id.* at 163. Mr. Lake's father mentioned him frequently to his American-born brothers, referred to him in conversation with others as his "son," and included him in the listing of his children in a family Bible. *Id.* at 129, 152-153, 163, 235-237. Joseph Lake repeatedly expressed a desire that Mr. Lake and his American-born siblings "meet as a family" one day in the United States. *Id.* at 121. Joseph Lake died on September 21, 1997, before his son was placed in removal proceedings. *Id.* at 119, 122, 274.

Mr. Lake entered the United States as a legal permanent resident on January 25, 1987, and has resided here ever since. He is married and has two children, both of whom are United States citizens. *See* Declaration of Frederick A. Lake at 2, Ex. 2 to Motion to Stay Deportation and Removal (2d Cir. filed Sept. 18, 1999). Mr. Lake is gainfully employed as an automobile mechanic, is a substantial contributor to the household's income, and is the primary caregiver for his two pre-school children during the day. *Id.* at 2.

On April 19, 1991—despite substantial evidence that he had been in Jamaica at the time—Mr. Lake was convicted of an armed robbery that had taken place in New York. On July 15, 1997, after serving the minimum term of his sentence, Mr. Lake was paroled, and he was subsequently released from that parole before the end of his term. Solely as a consequence of his conviction, INS agents arrested Mr. Lake on March 31, 1998, when he appeared for a scheduled appointment with his parole officer. He was subsequently released on bail, and continues to reside in New York with his family. Mr. Lake has never otherwise been arrested or convicted of any crime in any country.

On May 6, 1998, removal proceedings were commenced. During those proceedings, Mr. Lake argued that he had acquired United States citizenship at birth through his father. Mr. Lake contended that he was entitled to United States citizenship because the restrictions placed on his attainment of that right by 8 U.S.C. § 1409(a) violate the equal protection guarantee of the Fifth Amendment. The Immigration Judge held that he lacked the authority to consider Mr. Lake's equal protection challenge in the absence of a definitive ruling from this Court on the question. *See* Pet. App. 33a. Mr. Lake appealed the Immigration Judge's decision to the Board of Immigration Appeals ("BIA"), raising, *inter alia*, his constitutional challenge to Section 1409(a). The BIA dismissed his appeal without considering that claim on the ground that it lacks authority to consider the constitutionality of statutes it administers. Pet. App. 23a-24a.

Mr. Lake filed a timely petition for review with the Second Circuit, which reversed the decision of the BIA without dissent. The Court of Appeals held that Section 1409(a) contravenes equal protection because it improperly discriminates against citizen fathers in their ability to transmit citizenship to their non-marital children born abroad, and that Mr. Lake is entitled to United States citizenship as a result. Pet. App. 13a-18a. The court also rejected the Government's argument

that Mr. Lake lacked third-party standing to raise the equal protection rights of his deceased father. *Id.* at 11a-12a.

Mr. Lake also argued, in the alternative, that the BIA's decision should be vacated because 8 U.S.C. § 1182(h)—which precludes Mr. Lake from applying for discretionary relief from deportation—contravenes equal protection. Assuming *arguendo* that Mr. Lake is not a United States citizen and is instead a lawful permanent resident, Section 1182(h) would prevent him from applying for discretionary relief because of his conviction, even though similarly situated aliens who have never attained legal permanent resident status (including illegal aliens) can seek such relief. Mr. Lake therefore argued that the statute irrationally discriminated against legal permanent residents. However, in view of its holding that Mr. Lake is a United States citizen, the Second Circuit did not reach that alternative claim. Pet. 4a.

DISCUSSION

1. We agree with the Government that "[t]he Court * * * should hold the petition in this case pending the decision in *Nguyen*." Pet. 11. The principal issue in this case is whether Mr. Lake is entitled to United States citizenship because 8 U.S.C. § 1409(a) unconstitutionally discriminates on the basis of gender. That question is presented in *Nguyen*, which was argued on January 9, 2001. It appears that the only potentially relevant difference between this case and *Nguyen* is that the petitioner in *Nguyen*, by virtue of his age, is able to elect between two different versions of Section 1409, while Mr. Lake is subject to the more restrictive version of the statute as it existed before its 1986 amendment. *See* Pet. 10. However, because both versions discriminate against fathers, no party to this case has yet suggested that the differences between the two versions affect the equal protection analysis as presented by the petitioner in *Nguyen*. *See* Pet. App. 5a-6a. Thus, there is a substantial likelihood that this petition will be

controlled by the disposition in *Nguyen*, and Lake agrees that the petition should be held pending a decision in that case.

2. The Government nevertheless asserts that "if the Court's decision in *Nguyen* fails to resolve the merits of the constitutional issue in a manner that controls the decision of the constitutional issue in this case * * * then * * * the Court may wish to grant the petition for certiorari and summarily reverse the judgment of the court of appeals on third-party standing grounds." Pet. 11-12. We understand the Government to be conceding that if the Court were to hold in *Nguyen* that the petitioner in that case is entitled to United States citizenship by virtue of the unconstitutionality of Section 1409(a), then the Government would be estopped from urging a different result in Mr. Lake's case. We concur with this understanding, and the Court should therefore deny the petition in this case if it invalidates the statute in *Nguyen*.

However, we disagree with the Government's alternative suggestion that the Court should grant the petition and "summarily reverse" on the question of third-party standing in the event the decision in *Nguyen* does not control the disposition of this petition. Even the Government states that it "do[es] not believe that the third-party standing issue is itself of sufficient importance to warrant plenary review by this Court * * *." *Id.* at 11. We agree. Accordingly, there is no basis for granting certiorari on the standing question, much less a basis for summarily reversing on that question.

A litigant seeking to assert the rights of another party must satisfy three criteria: (1) an injury in fact, giving rise to a sufficiently concrete interest in the outcome of the issue in dispute; (2) a sufficiently close relation to the third party; and (3) some hindrance to the third party's ability to protect his or her own interests. *Powers* v. *Ohio*, 499 U.S. 400, 410-411 (1991). As the Court of Appeals noted, "there is no dispute that Lake has satisfied the first two elements." Pet. App. 11a. As to the third factor, the Court of Appeals easily rejected the

Government's contention that the death of Mr. Lake's father did not sufficiently hinder him from asserting his own rights. As the court held:

> The Government cites no authority for the proposition that a litigant seeking third-party standing must affirmatively demonstrate that the deceased holder of a right desired during his or her lifetime to vindicate that right and was hindered in doing so. We decline to read such a requirement into the law.

Pet. App. 11a.

Far from presenting grounds for certiorari or summary reversal, the Second Circuit's decision comports with the holdings of every court—including this Court—to have addressed the question. The precedents are *unanimous* that the death of the third party whose rights are being asserted is a sufficient "hindrance" giving rise to third-party standing. *See, e.g.*, *Hodel* v. *Irving*, 481 U.S. 704, 711-712 (1987); *Breyer* v. *Meissner*, 214 F.3d 416, 423 (3d Cir. 2000); *United States* v. *Ahumada-Aguilar*, 189 F.3d 1121, 1126 (9th Cir. 1999); *Wauchope* v. *United States Dep't of State*, 985 F.2d 1407, 1411 (9th Cir. 1993); *Elias* v. *United States Dep't of State*, 721 F. Supp. 243, 247 (N.D. Cal. 1989).

Indeed, as the Court of Appeals noted (Pet. App. 11a-12a), even the two Justices in *Miller* v. *Albright*, 523 U.S. 420 (1998), who did not find third-party standing in that case specifically acknowledged death to be an "extreme example" of the requisite "hindrance." *Id.* at 449 (O'Connor, J., concurring in the judgment). In *none* of the cited cases did the court consider it relevant whether the third party could have asserted his rights prior to his death, even though it is readily apparent from the facts of each case that the third party could have done so. *See Irving*, 481 U.S. at 709-710 (challenge to statute providing for escheat of certain property interests); *Breyer*, 214 F.3d at 423 (in challenge to statute allowing citizen fathers but not mothers to transmit citizenship, the death

of the plaintiff's mother "most definitely constitute[d] a hindrance to her assertion of her own rights"); *Ahumada-Aguilar*, 189 F.3d at 1126 (challenge to Section 1409); *Wauchope*, 985 F.2d at 1409-10 (challenge to statute allowing citizen fathers but not citizen mothers to transmit citizenship to children born abroad); *Elias*, 721 F. Supp. at 244 (same).

In accord with this unanimous weight of authority, the Court of Appeals properly declined to impose such a requirement on the facts of this case. Pet. App. 11a. Mr. Lake's father died before his son was placed in removal proceedings, while a proceeding to challenge Mr. Lake's underlying conviction was still pending. Thus, prior to his death, there was no need for Mr. Lake's father to have gone through the extraordinary time and expense of mounting an equal protection challenge to Section 1409(a). Mr. Lake was admitted into the United States as a lawful permanent resident in 1987 and could subsequently have sought to become a naturalized U.S. citizen on his own, without the need for such a constitutional case. *See* 8 U.S.C. §§ 1421, 1427. As the Court of Appeals correctly held, "[a]t the time that the necessity for Lake's constitutional challenge became apparent, Joseph Lake was irrevocably and finally hindered from vindicating his own rights, and we will not speculate as to his earlier intentions." Pet. App. 12a.

It borders on the absurd for the Government to contend that Mr. Lake's father was required to commence a constitutional attack on Section 1409 *before* the INS commenced removal proceedings against his son, or that a court must attempt to divine what the deceased Joseph Lake would now want his son to do. Accordingly, given the lack of any even arguable conflict among the lower courts and the Government's own concession that the standing issue does not warrant certiorari, the Court should reject the Government's suggestion that the Court grant certiorari and summarily reverse on that issue if *Nguyen* is not found controlling.

3. Given that *Nguyen* involves the same issue as this case, it appears likely that this petition will be controlled by the decision in *Nguyen* (although Mr. Lake, as noted above, has additional arguments against a finding of removability which the Second Circuit did not reach). However, in the event the Court believes, following its decision in *Nguyen*, that the decision in that case may not be controlling here, respondent respectfully requests that the Court allow him a further opportunity to address the Government's petition in light of the decision in *Nguyen*. Only after that decision can respondent fully assess its impact on this case.

CONCLUSION

For the foregoing reasons, consideration of the petition should be deferred pending resolution of *Nguyen*. In the event the Court concludes that this petition is not controlled by the decision in that case, the Court should allow respondent a further opportunity to respond to petitioner's arguments on standing and to otherwise address the significance of the *Nguyen* decision.

Respectfully submitted,

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